
BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1248

EDWARD R. STOLZ II, D/B/A ROYCE INTERNATIONAL
BROADCASTING COMPANY,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

ENTERCOM COMMUNICATIONS CORP. AND

ENTERCOM LICENSE, LLC,

INTERVENORS.

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

HOWARD J. SYMONS
GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

WILLIAM J. SCHER
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The appellant is Edward R. Stolz II, doing business as Royce International Broadcasting Company. The appellee is the Federal Communications Commission. The intervenors are Entercom Communications Corp. and Entercom License, LLC.

2. Rulings under review.

The rulings under review are: (1) *Royce International Broadcasting Company, Assignor and Entercom Communications Corp., Assignee, Application for Consent to the Assignment of License of Station KUDL(FM), Sacramento, California*, 30 FCC Rcd 10556 (2015) (JA __); and (2) *Royce International Broadcasting Company, Assignor and Entercom Communications Corp., Assignee, Application for Assignment of License of Station KUDL(FM) (formerly KWOD), Sacramento, California*, 31 FCC Rcd 7439 (2016) (JA __).

3. Related cases.

The Commission is not aware of any related cases in this Court.

TABLE OF CONTENTS

Table of Authorities.....	iii
Glossary.....	vii
Jurisdiction	1
Questions Presented	2
Statutes and Regulations	3
Counterstatement.....	3
A. Statutory and Regulatory Background	3
1. Commission Licensing Authority	3
2. The Local Radio Ownership Rule.....	4
3. The 2002 <i>Biennial Review Order</i>	5
B. The Proceedings Below.....	7
1. The Staff Rulings	8
2. The Commission Orders on Review	10
Summary of Argument.....	13
Standard of Review	15
Argument.....	16
I. The FCC Correctly Applied Its Own Local Radio Ownership Rule.....	16
II. The FCC Did Not Abuse Its Discretion By Denying Reconsideration.....	22
A. Royce Should Have Raised the <i>Kidd</i> Decision Earlier; In All Events, <i>Kidd</i> Is Inapposite.....	22
B. Royce’s Delay Argument Does Not Justify Reversal	26

III. Royce's Other Arguments Are Not Properly Before the Court and Are Moot	28
Conclusion.....	31

TABLE OF AUTHORITIES

CASES

<i>Advanced Commc'ns Corp. v. FCC</i> , 376 F.3d 1153 (D.C. Cir. 2004).....	16
* <i>ADX Commc'ns of Pensacola v. FCC</i> , 794 F.3d 74 (D.C. Cir. 2015).....	6, 14, 16, 22
<i>AT&T Corp. v. FCC</i> , 317 F.3d 227 (D.C. Cir. 2003)	28
* <i>AT&T Corp. v. FCC</i> , 363 F.3d 504 (D.C. Cir. 2004)	16, 22, 23, 25, 27, 28
<i>Brotherhood of Railway Carmen Div. v. Pena</i> , 64 F.3d 702 (D.C. Cir. 1995)	27
<i>Capello v. D.C. Board of Education</i> , 669 F.Supp. 14 (D.D.C. 1987).....	18
<i>Farmers and Merchants Mutual Tel. Co. of Wayland, Iowa v. FCC</i> , 668 F.3d 714 (D.C. Cir. 2011).....	27
<i>FCC v. Nat'l Citizens Comm. for Broad.</i> , 436 U.S. 775 (1978)	4
<i>General Carbon Co. v. OSHRC</i> , 860 F.2d 479 (D.C. Cir. 1988).....	15
<i>General Elec. Co. v. E.P.A.</i> , 53 F.3d 1324 (D.C. Cir. 1995).....	15
<i>Globalstar, Inc. v. FCC</i> , 564 F.3d 476 (D.C. Cir. 2009).....	28
<i>Graceba Total Commc'ns v. FCC</i> , 115 F.3d 1038 (D.C. Cir. 1997).....	24
<i>ICC v. Bhd. of Locomotive Engineers</i> , 482 U.S. 270 (1987)	23
<i>Int'l Telecard Ass'n v. FCC</i> , 166 F.3d 387 (D.C. Cir. 1999).....	29
<i>Kidd Comm'cns v. FCC</i> , 427 F.3d 1 (D.C. Cir. 2005).....	11, 12, 15, 22, 23, 25, 26
<i>Listeners' Guild, Inc. v. FCC</i> , 813 F.2d 465 (D.C. Cir. 1987).....	4

<i>Morris Commc'ns, Inc. v. FCC</i> , 566 F.3d 184 (D.C. Cir. 2009).....	27
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	18
<i>Prometheus Radio Project v. FCC</i> , 373 F.3d 372 (3d Cir. 2004)	7
<i>Prometheus Radio Project v. FCC</i> , 652 F.3d 431 (3d Cir. 2011)	7
<i>Radio Station WOW v. Johnson</i> , 326 U.S. 120 (1945)	4
<i>Richman Bros. Records, Inc. v. FCC</i> , 124 F.3d 1302 (D.C. Cir. 1997).....	29
<i>Robinson v. Shell Oil Co.</i> , 519 U.S. 337 (1997)	18
<i>Rural Cellular Ass'n v. FCC</i> , 588 F.3d 1095 (D.C. Cir. 2009).....	30
<i>Star Wireless, LLC v. FCC</i> , 552 F.3d 469 (D.C. Cir. 2008).....	16
<i>Talk America, Inc. v. Mich. Bell Tel. Co.</i> , 564 U.S. 50 (2011)	14
<i>Teledesic LLC v. FCC</i> , 275 F.3d 75 (D.C. Cir. 2001).....	29
<i>Valley Telecasting Co. v. FCC</i> , 336 F.2d 914 (D.C. Cir. 1964).....	23
<i>Vernal Enter., Inc. v. FCC</i> , 355 F.3d 650 (D.C. Cir. 2004).....	16
<i>Winter Park Commc'ns v. FCC</i> , 873 F.2d 347 (D.C. Cir. 1989).....	29
<i>WLIL, Inc. v. FCC</i> , 352 F.2d 722 (D.C. Cir. 1965)	23

ADMINISTRATIVE DECISIONS

* 2002 Biennial Regulatory Review, Report and Order, 18 FCC Rcd 13620 (2003).....	5, 6, 7, 17, 19, 20, 21, 22, 29
2014 Quadrennial Review Order, Second Report and Order, 31 FCC Rcd 9864 (2016)	7

<i>Amendment of Section 73.504(a)</i> , 69 FCC 2d 1244 (1978)	24
<i>Arecibo Radio Corp.</i> , 101 FCC 2d 545 (1985)	4
<i>Gilmore Broad. Corp.</i> , 5 FCC Rcd 5530 (1990)	24
<i>Golden Triangle Radio, Inc.</i> , 20 FCC Rcd 4396 (2005)	21
<i>Metropolitan Transit Auth.</i> , 31 FCC Rcd 1436 (2016)	25

STATUTES

5 U.S.C. § 706(2).....	26
5 U.S.C. § 706(2)(b).....	11
47 U.S.C. § 155(d).....	11, 12, 26, 27
47 U.S.C. § 301	3
47 U.S.C. § 303	3
47 U.S.C. § 307	3
47 U.S.C. § 308	3
47 U.S.C. § 309	3
47 U.S.C. § 310	3
47 U.S.C. § 310(d).....	4
47 U.S.C. § 402(b)(6).....	1
47 U.S.C. § 402(c).....	1
47 U.S.C. § 405(a).....	28
47 U.S.C. § 405(b).....	27
Telecommunications Act of 1996, Pub. L. No. 104- 104, 110 Stat. 56 (1996)	5

REGULATIONS

47 C.F.R. § 1.41	25
47 C.F.R. § 1.65	15, 17, 18, 29
47 C.F.R. § 1.65(a)	9, 14
47 C.F.R. § 1.106	19

47 C.F.R. § 1.106(b)(2)	13, 22, 23, 25, 28
47 C.F.R. § 1.106(p)(1)	12
47 C.F.R. § 1.115	19
47 C.F.R. § 1.115(d)	24
47 C.F.R. § 73.3555(a)	5
47 C.F.R. § 73.3555 Note 4	5
47 C.F.R. § 73.3572	19
47 C.F.R. § 73.3573	19
47 C.F.R. § 73.3574	19

OTHER AUTHORITIES

<i>Entercom Commc'ns Corp. v. Royce Int'l Broad. Corp., et al.</i> , Case No. 99AS04202, Interlocutory Judgment (Sup. Ct. Cal., Sacramento Co.)	13
<i>Entercom License, LLC</i> , Hearing Designation Order, FCC 16-153, 2016 WL 6393114 (rel. Oct. 27, 2016)	30
<i>Prometheus Radio Project v. FCC</i> , No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam)	7
<i>Prometheus Radio Project</i> , No. 03-3388 (3d Cir. Sept. 3, 2004)	7
Public Notice, <i>Media Bureau Announces Processing Guidelines for Broadcast Station Applications</i> , 18 FCC Rcd 11319 (Media Bur. 2003)	6, 18
<i>The American Heritage Dictionary of the English Language</i> (5th ed. 2011)	19

* Cases and other authorities principally relied upon are marked with asterisks.

GLOSSARY

Bureau	The Commission's Media Bureau
Commission or FCC	Federal Communications Commission
<i>First Order</i>	<i>Royce International Broadcasting Company, Assignor and Entercom Communications Corp., Assignee, Application for Consent to the Assignment of License of Station KUDL(FM), Sacramento, California, 30 FCC Rcd 10556 (2015) (JA __)</i>
KUDL	Broadcast Station KUDL(FM) (formerly KWOD), Sacramento, California
Royce	Edward R. Stolz II, doing business as Royce International Broadcasting Company, the former KUDL licensee
<i>Second Order</i>	<i>Royce International Broadcasting Company, Assignor and Entercom Communications Corp., Assignee, Application for Consent to the Assignment of License of Station KUDL(FM) (formerly KWOD), Sacramento, California, 31 FCC Rcd 7349 (2016) (JA __)</i>

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1248

EDWARD R. STOLZ II, D/B/A ROYCE
INTERNATIONAL BROADCASTING COMPANY,

APPELLANT,

v.

FEDERAL COMMUNICATIONS
COMMISSION,

APPELLEE.

ENTERCOM COMMUNICATIONS CORP. AND
ENTERCOM LICENSE, LLC,

INTERVENORS.

BRIEF FOR APPELLEE

JURISDICTION

Edward R. Stolz II, doing business as Royce International Broadcasting Company (“Royce”), seeks review of a Commission order released on June 20, 2016, as well as a prior Commission order regarding the same license assignment application. Royce filed a timely notice of appeal on July 19, 2016. This Court has jurisdiction to review the orders under 47 U.S.C. § 402(b)(6) and (c).

QUESTIONS PRESENTED

This case arises from a private contract-law dispute between Royce and Entercom Communications Corp. (“Entercom”) over the sale of radio station KUDL(FM) (formerly KWOD), Sacramento, California. A state court ruled against Royce and directed the filing of an application for Commission approval of the assignment of the station license to Entercom. Royce petitioned the FCC to deny the application on the ground that the assignment would make Entercom the owner of five FM radio stations in the Sacramento area. The FCC’s Media Bureau rejected Royce’s objection and granted the application, finding that the assignment complied with the numerical limits of the FCC’s then-governing local radio ownership rule.

After the assignment was consummated, in a separate rulemaking proceeding, the FCC modified the local radio ownership rule by changing how it defines local radio markets. The FCC applied the rule prospectively, “grandfathering” existing station combinations. Nevertheless, Royce asked the Bureau to reconsider its approval of the KUDL assignment, arguing that Entercom should have to demonstrate compliance with the subsequently modified rule. The Bureau denied Royce’s request, and Royce filed an application for Commission review.

After the Commission affirmed the Bureau's action, Royce requested reconsideration based on two new arguments: first, that an unrelated decision by this Court allegedly called into question the validity of the assignment; and second, that the time the FCC took to decide the application for review violated statutory requirements. The FCC denied reconsideration, concluding Royce should have raised these issues before the Commission decided the application for review.

The questions presented in this case are:

1. Did the Commission correctly apply its own local radio ownership rule?
2. Did the Commission abuse its discretion by denying Royce's petition for reconsideration?
3. Are Royce's challenges to staff decisions that are not under review and did not affect the outcome of the case properly before this Court?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

COUNTERSTATEMENT

A. Statutory and Regulatory Background

1. Commission Licensing Authority

The Commission has exclusive jurisdiction to grant or deny applications for broadcast licenses. *See* 47 U.S.C. §§ 301, 303, 307, 308, 309 and 310. Thus, when a licensee sells or otherwise transfers ownership of a broadcast station, the licensee must apply to the FCC seeking its consent to assign the station's license to the new

owner. Before approving such an assignment, the FCC must determine that the assignment will serve the public interest. *Id.* § 310(d).

The FCC has a “longstanding policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts.” *Listeners’ Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987). It reconciles that policy with its exclusive licensing authority by accommodating state court decisions when possible consistent with FCC regulations. *Arecibo Radio Corp.*, 101 FCC 2d 545, 548 ¶ 7 (1985). “[I]f the State’s ... [laws] can be effectively respected while at the same time reasonable opportunity is afforded for the protection of that public interest which [leads] to the granting of a license, the principle of fair accommodation between State and federal authority ... should be observed.” *Radio Station WOW v. Johnson*, 326 U.S. 120, 132 (1945), quoted in *Arecibo*, 101 FCC 2d at 548 ¶ 7.

2. The Local Radio Ownership Rule

“In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.” *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978). The Commission’s local radio ownership rule limits the number of radio stations that an entity may own in a local market. 47

C.F.R. § 73.3555(a). As pertinent here, the rule allows an entity to own up to eight commercial radio stations, not more than five of which are in the same service (*i.e.*, AM or FM), in a market with 45 or more full-power, commercial and non-commercial radio stations. *Id.* The rule generally applies to applications for assignment of a station license. *Id.* Note 4. It does not, however, apply retroactively so as to require divestiture of existing station combinations because of changes in a local market or in the limits on local radio station ownership. *Id.*

3. The 2002 Biennial Review Order

By statute, the Commission must review its media ownership rules regularly and “repeal or modify any regulation it determines to be no longer in the public interest.” Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996). In accordance with its review obligations, the FCC initiated a review of the media ownership rules in 2002, which culminated in the *2002 Biennial Regulatory Review*, Report and Order, 18 FCC Rcd 13620 (2003) (subsequent history omitted) (*2002 Biennial Review Order*). The FCC retained its numerical limits on local radio station ownership, but revised the definition of a

local radio market to which the limits apply. *Id.* at 13724 ¶¶ 273-274.¹

As a result of the revised definition, the Commission recognized that “some existing combinations” of radio stations might now exceed the local radio ownership rule’s numerical limits. *Id.* at 13807 ¶¶ 482-83. Consistent with its general approach, *see id.* at 13808 n.1032, the FCC decided “to grandfather existing combinations of radio stations . . . As such, we will not require entities to divest their current interests in stations in order to come into compliance with the new ownership rules.” *Id.* at 13808 ¶ 484. The FCC explained that forced divestitures would “unfairly penalize parties who bought stations in good faith in accordance with the Commission’s rules,” and “would be too disruptive to the industry.” *Id.*

The Commission also adopted “processing guidelines” for broadcast station license assignment applications that were “pending and new” as of June 2, 2003, the adoption date of the *2002 Biennial Review Order*. *Id.* at 13813-14 ¶ 498; *see Media Bureau Announces Processing Guidelines for Broadcast Station Applications*, 18 FCC Rcd 11319 (Media Bur. 2003). “Applications filed on or

¹ Instead of the area covered by the overlapping signal contours of the radio stations in a proposed combination, the revised definition relies on Nielson Audio Metro Survey Areas. *2002 Biennial Review Order*, 18 FCC Rcd at 13724 ¶¶ 273-274. *See ADX Commc’ns of Pensacola v. FCC*, 794 F.3d 74, 76-77 (D.C. Cir. 2015) (summarizing the FCC’s reasons for adopting the revised definition).

after the effective date of this *Order* as well as applications that are still pending as of such effective date will be processed under the new multiple ownership rules,” including the revised local radio market definition. *2002 Biennial Review Order*, 18 FCC Rcd at 13813 ¶ 498.

The Third Circuit stayed the effectiveness of the *2002 Biennial Review Order* on September 3, 2003, *Prometheus Radio Project v. FCC*, No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam), but lifted the stay one year later with respect to the revised local radio market definition. *See Prometheus Radio Project*, No. 03-3388 (3d Cir. Sept. 3, 2004).²

B. The Proceedings Below

On November 20, 2002, an application was filed for Commission approval to assign the station KUDL license from Royce to Entercom. FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, FCC File No. BALH-20021120ACE (JA __) (“Application”). The Application was filed under the direction of a California state court, pursuant to the

² The Court ultimately affirmed the revised local radio market definition, but remanded for further explanation the decision to retain the local radio ownership rule’s numerical limits. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 423, 431 (3d Cir. 2004) (subsequent history omitted). In 2011, the Court affirmed the FCC’s decision to retain the rule as modified in the *2002 Biennial Review Order*. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 462 (3d Cir. 2011). The Commission also retained the rule in 2016. *2014 Quadrennial Review Order*, Second Report and Order, 31 FCC Rcd 9864, 9897 ¶¶ 82-83 (2016).

court's order for specific performance of a \$25 million contract for the sale of KUDL from Royce to Entercom. *See id.* Attachment 1 (JA ____).

Royce petitioned the FCC to deny the Application. Petition to Deny (Dec. 30, 2002) (JA ____). Royce acknowledged that the proposed assignment complied with the local radio ownership rule under the then-governing rule's local radio market definition, *id.* 1-2 (JA ____), but argued that the FCC should apply one of four different definitions Royce proposed to find that the assignment would violate the rule's numerical limits. *Id.* 17 (JA ____).

1. The Staff Rulings

On May 12, 2003, the Commission's Media Bureau granted the Application and denied Royce's petition to deny. *Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau to Andrew S. Kersting, Esq. and Brian M. Madden, Esq., File No. BALH-20021120ACE (May 12, 2003) ("First Staff Ruling")* (JA ____). The Bureau found that the Application complied with the local radio ownership rule,³ that Entercom was qualified to be the licensee of KUDL, and that grant of the Application would serve the public interest. *Id.* 5-6 (JA ____). The assignment of KUDL's license to Entercom was consummated one week later on May 19, 2003.

³ The Bureau explained that the rule did not "provide for selective exclusion of certain stations [from a local radio market] and we will not do so based on Royce's criticism of the Commission's current method of defining local radio markets." *First Staff Ruling* 4 (JA ____).

Letter from Brian M. Madden, Esq., to Marlene H. Dortch, Secretary, Federal Communications Commission (May 20, 2003) (JA ____).

On June 11, 2003, Royce petitioned for reconsideration, raising a new argument. It now argued that Entercom should be required to demonstrate compliance with the local radio ownership rule as modified in the *2002 Biennial Review Order*, which was adopted on June 2, 2003, after the assignment was granted and consummated. *Petition for Reconsideration* (June 11, 2003) (JA ____). Royce argued that the Application remained “pending” for purposes of the processing guidelines in the *2002 Biennial Review Order* until its grant was final and non-reviewable. *Id.* 2 (JA ____). In support of this argument, Royce relied on the definition of “pending” in a Commission rule that generally requires applicants to maintain the accuracy and completeness of information furnished in applications throughout the administrative and judicial process. *Id.*; *see* 47 C.F.R. § 1.65(a) (“For the purposes of this section, an application is ‘pending’ before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.”).

The Bureau denied Royce’s petition for reconsideration. *Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau to Royce International Broadcasting Company and Entercom Communications Corp.*, File No. BALH-

20021120ACE (Aug. 22, 2005) (“*Second Staff Ruling*”) (JA ____). The Bureau reasoned that because KUDL was part of an existing combination of Entercom radio stations as of the June 2, 2003, adoption date of the modified rule, the FCC’s grandfathering decision in the *2002 Biennial Review Order* was controlling, rather than its processing guidelines for pending applications. *Id.* 2-3 (JA ____). Thus, the Bureau explained, “Royce’s reliance on Section 1.65 is misplaced.” *Id.* 4 (JA ____). The Bureau also pointed out that the Third Circuit had stayed the effective date of the rule modifications adopted in the *2002 Biennial Review Order*. *Id.* 3 (JA ____).

2. The Commission Orders on Review

Royce sought full Commission review of the Bureau’s action. Application for Review (Sept. 20, 2005) (JA ____). Royce argued that the Bureau failed to address its argument that the Application was subject to the subsequently modified local radio market rule under the *2002 Biennial Review Order* processing guidelines because it remained “pending” within the meaning of section 1.65(a). *Id.* 3-7 (JA ____). Royce also argued that the Bureau erred in relying on the Third Circuit stay. *Id.* 5 (JA ____). Entercom and Royce filed an opposition and a reply, respectively, on October 5 and October 19, 2005. Reply (Oct. 19, 2005) (JA ____); Opposition (Oct. 5, 2005) (JA ____).

In September 2015, the Commission denied Royce’s application for review. *Royce International Broadcasting Company, Assignor and Entercom*

Communications Corp., Assignee, 30 FCC Rcd 10556 (2015) (“*First Order*”) (JA ____). The FCC concluded that the Bureau correctly applied the local radio ownership rule in effect when the Application was granted, and that the FCC’s grandfathering decision was controlling. *Id.* ¶ 4 (JA ____). The FCC squared the processing guidelines with the grandfathering decision by explaining that, in context, “the word ‘pending’ was meant to exclude applications on which the Bureau had already acted.” *Id.* ¶ 5 (JA ____). The section 1.65(a) definition, the FCC stated, applied only for the purposes of that section. *Id.* (JA ____). The Commission dismissed Royce’s argument regarding the Third Circuit stay, noting that the stay did not affect the Commission’s decision. *See id.* ¶ 3 & n.11 (JA ____).

Royce sought reconsideration of the Commission’s *First Order*, raising two entirely new arguments: (1) the time the FCC took to decide Royce’s application for review violated 47 U.S.C. § 155(d)⁴ and 5 U.S.C. § 706(2)(b); and (2) grant of the Application was inconsistent with *Kidd Communications v. FCC*, 427 F.3d 1 (D.C. Cir. 2005), which was decided one week after the close of the formal pleading cycle for Royce’s application for review in 2005. Petition for Reconsideration 3-7 (Oct. 19, 2015) (JA ____).

⁴ Section 155(d) provides for regular Commission meetings and establishes “the objective of rendering a final decision (1) within three months from the date of [the] original application, renewal, and transfer cases in which it will not be necessary to hold a hearing . . .” 47 U.S.C. § 155(d).

The Bureau dismissed Royce's 2015 petition for reconsideration pursuant to section 1.106(p)(1) of the FCC's rules, which authorizes the staff to dismiss or deny a petition for reconsideration of Commission action that "plainly does not warrant Commission consideration." *Royce International Broadcasting Company, Assignor and Entercom Communications Corp., Assignee, Order on Reconsideration*, 31 FCC Rcd 214, 216 ¶ 6 (Media Bur. 2016) ("Third Staff Ruling") (quoting 47 C.F.R. § 1.106(p)(1)) (JA ____). Section 155(d) does not establish a mandatory deadline, the Bureau explained, and Royce had not shown prejudice from the time lapse. *Id.* ¶ 7 (JA ____).

As for the 2005 *Kidd* decision, the Bureau explained that it was inapposite. *Id.* ¶ 8 (JA ____). The FCC in *Kidd* had granted an involuntary assignment application filed pursuant to a state court order. *Kidd*, 427 F.3d at 2. But the transaction in *Kidd* involved security interests in a station license that are prohibited by FCC regulations. *Id.* at 3. The Court ruled that the FCC did not adequately reconcile its action with its policy against security interests in licenses. *Id.* at 6. In contrast, the KUDL Application "complied with all pertinent statutory and regulatory requirements." *Third Staff Ruling* ¶ 8 (JA ____). And contrary to Royce's argument, the state court did not "order the FCC to grant" the Application, but instead ordered the Application to be filed "in accordance with applicable FCC policies and rules." *Id.* (quoting *Entercom Commc'ns Corp. v. Royce Int'l*

Broad. Corp., et al., Case No. 99AS04202, Interlocutory Judgment at 4 (Sup. Ct. Cal., Sacramento Co.)) (JA ____).

Royce filed another application for review, repeating the same arguments. Application for Review (Feb. 18, 2016) (JA ____). The Commission again affirmed the Bureau's action. *Royce International Broadcasting Company, Assignor and Entercom Communications Corp., Assignee*, 31 FCC Rcd 7439 (2016) ("Second Order") (JA ____). Rather than address the merits of Royce's arguments based on *Kidd* and the agency's delay in reaching a final decision on Royce's 2005 application for review, the FCC ruled that the arguments did not warrant reconsideration under 47 C.F.R. § 1.106(b)(2) because Royce had ample opportunity to present them while its 2005 application for review was pending. *Id.* ¶¶ 5-6 (JA ____). "Royce could have filed a motion to accept a late-filed pleading with the Bureau . . . during the pendency of the 2005 [application for review]. The Commission historically has found that good cause exists for acceptance of such pleadings." *Id.* ¶ 6 (JA ____). The FCC acknowledged that the delay was "regrettable," but concluded that it did "not alter the fact that the Bureau's grant of the Application was appropriate." *Id.* ¶ 8 (JA ____).

SUMMARY OF ARGUMENT

Royce does not dispute that the assignment of station KUDL complied with the local radio ownership rule in effect when the FCC granted the Application, or

that the assignment was consummated before the rule was modified. The FCC reasonably explained that the assignment was not subject to the modified rule because of the Commission's decision to "grandfather" existing station combinations, and that its processing guidelines for applications that were "pending" when the rule was modified did not apply because the Application had already been processed and granted. Royce's argument to the contrary based on section 1.65(a) of the FCC's rules lacks merit. As the Commission explained, that rule expressly limits its definition of "pending" to that rule, which is irrelevant to the local radio ownership rule at issue here. Thus, Royce has failed to show that the Commission's interpretation of its own regulations "is plainly erroneous or inconsistent with the regulations or [that] there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter," and there is no basis for overturning the FCC's approval of the KUDL assignment. *ADX Commc'ns*, 794 F.3d at 82 (quoting *Talk America, Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 59 (2011)).

The FCC did not abuse its discretion by denying reconsideration based on arguments that Royce raised after its application for review was decided. Royce could have raised the new arguments while the application for review was pending by filing supplemental pleadings. Having failed to do so, Royce cannot meet the

requirement that its new arguments rest on facts or events that it could not have raised before the FCC decided its application for review.

In all events, Royce's new arguments lack merit. The Court held in *Kidd* that the Commission need not accommodate a state court decision if doing so would result in a violation of FCC policy; the Court did not call into question the FCC's longstanding policy of accommodating state court decisions when consistent with FCC regulations. And the Commission's delay in deciding the application for review did not violate any statutory deadline and did not prejudice Royce.

Finally, Royce's remaining arguments regarding the Media Bureau's rulings – that the Bureau ignored its argument based on section 1.65 of the Commission's rules, and improperly relied on a judicial stay in not applying the modified local radio ownership rule – challenge staff decisions that are not under review.

Accordingly, these arguments are not properly before the Court. They also are moot, as they had no effect on the Commission decisions on review.

STANDARD OF REVIEW

Royce maintains that the FCC incorrectly applied its local radio ownership rule. The Court “accord[s] an agency’s interpretation of its own regulations a ‘high level of deference,’ accepting it ‘unless it is plainly wrong.’” *General Elec. Co. v. E.P.A.*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (quoting *General Carbon Co. v. OSHRC*, 860 F.2d 479, 483 (D.C. Cir. 1988)). *Accord ADX Commc’ns*, 794 F.3d at

79 (Court “must defer to the ‘Commission’s interpretation of its own rules . . . unless it is plainly erroneous or inconsistent with the regulation.”) (quoting *Star Wireless, LLC v. FCC*, 552 F.3d 469, 473 (D.C. Cir. 2008)). The Court “similarly defers to the Commission’s ‘reasonable application of its own precedents.’” *Id.* (quoting *Vernal Enter., Inc. v. FCC*, 355 F.3d 650, 658 (D.C. Cir. 2004)).

Royce also challenges the denial of reconsideration based on the new arguments Royce raised after the Commission decided Royce’s 2005 application for review. “The general rule is that an agency’s denial of a petition for reconsideration is not subject to judicial review.” *AT&T Corp. v. FCC*, 363 F.3d 504, 507 (D.C. Cir. 2004). “[A] court will reverse an agency’s denial of reconsideration only in the most extraordinary circumstances, and only if the agency has engaged in the clearest abuse of discretion.” *Id.* at 509 (internal quotations and citations omitted); see *Advanced Commc’ns Corp. v. FCC*, 376 F.3d 1153, 1156 (D.C. Cir. 2004).

ARGUMENT

I. THE FCC CORRECTLY APPLIED ITS OWN LOCAL RADIO OWNERSHIP RULE

The FCC properly refused to apply the modified local radio ownership rule, which was adopted after the license assignment was approved and consummated, to Entercom’s ownership of station KUDL. See *First Order* ¶ 4 (JA ____). The assignment was consummated on May 19, 2003, one week after the FCC approved

the assignment based on the undisputed finding that it complied with the local radio ownership rule in effect at that time. *See Second Staff Ruling* 2-3 (JA ____).

Thus, when the Commission modified the rule by redefining local radio markets in June 2003, KUDL was part of Entercom's "existing combination[]" of Sacramento radio stations. *2002 Biennial Review Order*, 18 FCC Rcd at 13808 ¶ 484.

Recognizing that some existing station combinations might now exceed the rule's numerical limits as a result of the rule modification, the FCC "grandfather[ed] existing combinations of radio stations," stating that "we will not require entities to divest their current interests in stations in order to come into compliance with the new ownership rules." *Id.*

Royce argues that the modified rule should have been applied under the FCC's processing guidelines in the *2002 Biennial Review Order* for "pending" assignment applications. Relying on section 1.65 of the FCC's rules, Royce maintains that the Application was "pending" in June 2003 (and remains pending to this day) because its grant was not final and non-reviewable. Br. 23-27 (citing 47 C.F.R. § 1.65). But as the FCC pointed out, the definition of "pending" in section 1.65 is expressly limited to that section. *First Order* ¶ 5 (JA ____); 47 C.F.R. § 1.65. Section 1.65 requires applicants to maintain the accuracy and completeness of the information in their applications throughout administrative and judicial proceedings. As the FCC explained, that is "wholly unrelated to the determination

of how the Commission's ownership rules should be applied in specific cases.”

First Order ¶ 5 (JA ___); *see* 47 C.F.R. § 1.65.⁵

The FCC reasonably interpreted the term “pending” in the *2002 Biennial Review Order* processing guidelines “to exclude applications on which the Bureau had already acted.” *First Order* ¶ 5 (JA ___). The Commission's interpretation is consistent with the context in which it used the term “pending,” as well as the rest of the *2002 Biennial Review Order* and agency precedent. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (“statutory interpretation turns on ‘the language itself, the specific context in which that language is used, and the broader context of the statute as a whole’”) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). In that regard, as Judge Parker observed in *Capello v. D.C. Board of Education*, 669 F.Supp. 14, 17 (D.D.C. 1987), the D.C. Circuit “has never adopted a uniform definition of ‘pending.’ Rather, it analyzes each statute individually. It examines the language of the statute, how the word ‘pending’ fits into the context of the statute and which definition would best comport with the purpose of the statute.”

⁵ Contrary to Royce's suggestion, *see* Br. 24, the Bureau's Public Notice announcing the processing guidelines in the *2002 Biennial Review Order* made no mention of section 1.65. *Media Bureau Announces Processing Guidelines for Broadcast Station Applications*, 18 FCC Rcd at 11319.

Here, the FCC used “pending” to describe which applications would be subject to “processing” under its revised media ownership rules. *2002 Biennial Review Order*, 18 FCC Rcd at 13813 ¶ 498 (“[a]pplications filed on or after the effective date of this *Order* as well as applications that are still pending as of such effective date will be processed under the new multiple ownership rules.”). In Commission parlance, application “processing” refers to procedures for application grant or denial, as opposed to procedures for agency or judicial review. *Compare* 47 C.F.R. §§ 1.106 (Petitions for reconsideration in non-rulemaking proceedings), 1.115 (Application for review of action taken pursuant to delegated authority) *with id.* §§ 73.3572 (Processing of TV broadcast, Class A TV broadcast, low power TV, TV translators, and TV booster applications), 73.3573 (Processing of FM broadcast station applications), 73.3574 (Processing of international broadcast station applications). In the context of guidelines for processing applications, therefore, the FCC reasonably interpreted “pending” to mean not yet granted or denied. *First Order* ¶ 5 (JA ____). That interpretation is consistent with the word’s ordinary meaning as well as the context in which the Commission used it. *See, e.g., The American Heritage Dictionary of the English Language* 1303 (5th ed. 2011) (defining “pending” to mean, *inter alia*, “not yet decided or settled; awaiting conclusion or confirmation”). In contrast, Royce’s interpretation to cover

processed applications whose grant or denial remains subject to FCC or judicial review makes no sense in this context.⁶

The FCC's interpretation also harmonizes the processing guidelines with the rest of the *2002 Biennial Review Order*. The *Order*'s grandfathering discussion 14 paragraphs before its discussion of processing guidelines does not distinguish between "existing combinations" with final and non-final authorizations. *2002 Biennial Review Order*, 18 FCC Rcd at 13808-10 ¶¶ 484-87. As a result, the scope of grandfathering includes existing combinations whose authorizations are non-final, consistent with the Commission's interpretation of the processing guidelines. *See id.* The FCC also stated that its purpose in grandfathering existing combinations was to ensure that no entity would have to "divest" its station interests to comply with the revised ownership rules. *Id.* at 13808 ¶ 484. Yet that is exactly what might happen under Royce's interpretation.⁷

It is no answer for Royce to argue that Entercom knew it might be required to divest KUDL because its authorization to hold the license was non-final. *See Br.*

⁶ Royce's interpretation also could create perverse incentives, encouraging administrative and judicial challenges of Commission-approved transactions in the hope that future rule changes might invalidate otherwise lawful transactions.

⁷ Royce points out that the Commission did not grandfather the sale of existing combinations or the creation of new combinations. Br. 29-30. But the KUDL license assignment involved neither of these things. KUDL was part of an existing combination of Entercom stations at the time of the *2002 Biennial Review Order*.

25-27. The FCC wished to avoid industry disruption. *2002 Biennial Review Order*, 18 FCC Rcd at 13808 ¶ 484. Required divestiture is disruptive whether or not the station owner knows that it is a risk. The Commission also did not wish to “unfairly penalize parties who bought stations in good faith in accordance with the Commission’s rules.” *Id.* Regardless of finality, rescinding grant of the KUDL Application would unfairly penalize Entercom, which consummated the assignment on May 19, 2003 (and contracted to purchase the station in 1996) in accordance with the local radio market rule then in effect. *See Br. 7; Letter from Brian M. Madden, Esq., to Marlene H. Dortch, Secretary, Federal Communications Commission* (May 20, 2003) (JA ____).

As the Commission pointed out, *First Order* ¶ 5 & n.17 (JA ____), its interpretation of the processing guidelines also is consistent with its own precedent. In *Golden Triangle Radio, Inc.*, 20 FCC Rcd 4396 (2005), the FCC refused to apply the modified local radio ownership rule to a station combination that it had approved before adoption of the *2002 Biennial Review Order*, despite the fact that, as in this case, the grant of the assignment application remained non-final. “We do not generally apply changes in ownership rules retroactively so as to require divestiture of existing combinations,” the FCC explained, “and we did not do so when we revised the local radio rule.” *Id.* at 4397-98 ¶ 3. In sum, therefore, the FCC reasonably interpreted its own regulations in refusing to apply the

subsequently revised local radio ownership rule to Entercom's ownership of KUDL. The Commission's decision easily satisfies the deferential standard of review. *See ADX Commc'ns*, 794 F.3d at 79 (deferring to FCC's reasonable interpretation of the 2002 *Biennial Review Order* and the local radio ownership rule).

II. THE FCC DID NOT ABUSE ITS DISCRETION BY DENYING RECONSIDERATION

After the Commission denied Royce's application for review in 2015, Royce sought reconsideration on two new grounds: this Court's 2005 decision in *Kidd*, 427 F.3d at 1, and the FCC's delay in deciding the application for review. The FCC denied reconsideration, concluding that Royce could have presented these arguments earlier, and had not demonstrated that the delay prejudiced it. The denial of reconsideration is not subject to reversal absent "the clearest abuse of discretion." *AT&T Corp.*, 363 F.3d at 509. Royce has not shown that the FCC erred, let alone that it abused its discretion.

A. Royce Should Have Raised the *Kidd* Decision Earlier; In All Events, *Kidd* Is Inapposite

The FCC reasonably concluded that the 2005 *Kidd* decision was not a new fact under 47 C.F.R. § 1.106(b)(2). When the FCC has denied an application for review, that rule provides for dismissal of a petition for reconsideration unless:

- (i) The petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; or
- (ii) The petition relies on facts or arguments unknown to the petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts prior to such opportunity.

Id. To constitute new facts under section 1.106(b)(2), “the failure to have the evidence placed before the agency in the original proceeding must be of ‘no fault’ of the petitioner.” *AT&T Corp.*, 363 F.3d at 509-10 (quoting *ICC v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 279 (1987)).

This procedural requirement is not a mere technicality, but rests on important public interest considerations: “[o]rderliness, expedition, and finality in the adjudicating process are appropriate weights in the scale, as reflecting a public policy which has authentic claims of its own.” *WLIL, Inc. v. FCC*, 352 F.2d 722, 725-26 (D.C. Cir. 1965) (affirming denial of petition for reconsideration of radio station license grant where petitioner did not object to application during the three years it was pending before the FCC and did not show that reasonable diligence would not have disclosed the facts alleged in the petition during that time) (quoting *Valley Telecasting Co. v. FCC*, 336 F.2d 914, 917 (D.C. Cir. 1964)).

Kidd was decided on October 25, 2005, *see Kidd*, 427 F.3d at 1, years before the FCC denied Royce’s application for review on September 17, 2015. *First Order* (JA ____). The formal pleading cycle for Royce’s application for review

closed on October 19, 2005, six days before the *Kidd* decision. *See id.* ¶ 1 n.1 (JA ___); 47 C.F.R. § 1.115(d). Although section 1.115(d) of the FCC’s rules does not specifically authorize supplemental pleadings to present arguments in these circumstances, “parties may supplement their pleadings in pending proceedings with agency approval.” *Graceba Total Commc’ns v. FCC*, 115 F.3d 1038, 1041 (D.C. Cir. 1997). The FCC has found good cause to waive section 1.115(d) and accept supplemental pleadings in similar circumstances. *See, e.g., Gilmore Broad. Corp.*, 5 FCC Rcd 5530, n.1 (1990) (waiving the rule to accept supplemental pleadings “[s]ince the pleadings relate in large measure to subsequent developments that could not previously have been raised”); *Amendment of Section 73.504(a)*, 69 FCC 2d 1244, 1244-45 ¶ 2 (1978) (waiving the rule to accept supplemental pleading “since we wish to answer it on substantive grounds so there will be no misunderstanding of the basis for the action taken.”). “Royce could have filed a motion to accept a late-filed pleading,” therefore, “upon release of the *Kidd* decision or at any time during the pendency of the 2005 [application for review].”

Second Order ¶ 6 (JA ____).⁸ Indeed, Royce does not contend otherwise. Given Royce’s failure to take advantage of this opportunity, the FCC reasonably concluded that *Kidd* was not a new fact under section 1.106(b)(2). *See AT&T Corp.*, 363 F.3d at 509-10 (denial of reconsideration was not reviewable where petitioner could have presented new data before the Commission issued its decision through the exercise of reasonable diligence, but failed to do so).

In all events, as the Bureau noted, *Kidd* is inapposite. *Third Staff Ruling* ¶ 8 (JA ____). Like this case, *Kidd* involved the FCC’s grant of an involuntary assignment application filed under the direction of a state court. *See Kidd*, 427 F.3d at 4. Contrary to Royce’s argument, however, *Kidd* did not “ma[k]e it illegal for the FCC to process an assignment application filed without the consent or participation of the licensee.” Br. 21.⁹ The application in *Kidd* was not challenged on that ground, and the Court did not call into question the FCC’s longstanding

⁸ Royce also could have asked the Commission to consider a supplemental filing informally. *See* 47 C.F.R. § 1.41 (“Except where formal procedures are required under the provisions of this chapter, requests for action may be submitted informally.”). The “availability of formal procedures does not bar the Commission from considering arguments made by an informal requestor for action under Section 1.41 in appropriate cases.” *Metropolitan Transit Auth.*, 31 FCC Rcd 1436, 1442 ¶ 17 (2016).

⁹ Nor did the state court in this case “order the FCC to grant” the assignment application. Br. 23. Instead, the state court “ordered ‘the electronic filing ... of FCC Form 314 in accordance with applicable FCC policies and rules.’” *Third Staff Ruling* ¶ 8 (internal citation omitted) (JA ____).

policy of accommodating state court decisions. *Kidd*, 427 F.3d at 3; *see supra* pg.

4. Rather, the Court ruled that “the Commission is not obliged to accommodate a state court’s decision *that is contrary to Commission policy*.” *Kidd*, 427 F.3d at 6 (emphasis added). The transaction in *Kidd* involved security interests in a station license that are prohibited by FCC regulations. *Id.* at 3. Here, in contrast, the Application complied with the FCC regulations in effect at the time of grant, so *Kidd* does not apply.

B. Royce’s Delay Argument Does Not Justify Reversal

Royce argues that the time the FCC took to decide the 2005 application for review violated 47 U.S.C. § 155(d) – which provides for regular Commission meetings and establishes “the objective of rendering a final decision (1) within three months from the date of [the] original application, renewal, and transfer cases in which it will not be necessary to hold a hearing” – and constitutes reversible error under 5 U.S.C. § 706(2).¹⁰ Br. 17-21. As the Bureau noted, *Third Staff Ruling* ¶ 7 (JA ___), section 155(d) by its terms establishes a directory “objective” rather than a mandatory deadline. *Cf. Brotherhood of Railway Carmen Div. v. Pena*, 64

¹⁰ Section 706(2) provides that, *inter alia*, “[t]he reviewing court shall— ... (2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law.” 5 U.S.C. § 706.

F.3d 702, 704 (D.C. Cir. 1995) (where there is no “clear indication that Congress intended otherwise, we will deem a statutory deadline to be directory.”).¹¹

Moreover, Royce was not prejudiced. *Second Order* ¶ 5 (JA ____). The passage of time had no bearing on the FCC’s decision, which rested on the fact that KUDL was part of an existing combination of Entercom stations before the FCC modified the local radio ownership rule in 2003. *Id.*¹²

The FCC’s denial of reconsideration was reasonable, not a clear “abuse of discretion” that is subject to reversal. *AT&T Corp.*, 363 F.3d at 509. Royce maintains that the Commission violated 47 U.S.C. § 155(d) beginning on January 19, 2006 – that is, three months after the formal pleading cycle closed for the application for review. *See* Br. 17. Royce failed to raise the issue before the agency, however, either formally or informally, *see supra* pgs. 24-25 & n.8, until

¹¹ In all events, the statute identifies no consequence for failing to meet the objective. Thus, the Court in *Farmers and Merchants Mutual Tel. Co. of Wayland, Iowa v. FCC*, 668 F.3d 714, 718 (D.C. Cir. 2011), held that even if the Commission had missed the mandatory deadline for deciding certain petitions for reconsideration under 47 U.S.C. § 405(b), “it would not have lost jurisdiction ... because Congress established no consequence for failing to meet that deadline.”

¹² Royce states in passing that the delay “renders the FCC with ‘unclean hands.’” Br. 17. “To apply equitable estoppel against the government,” a party must show, among other things, that it “relied on its adversary’s conduct in such a manner as to change his position for the worse.” *Morris Commc’ns, Inc. v. FCC*, 566 F.3d 184, 191 (D.C. Cir. 2009) (internal quotations and citations omitted). As stated above, Royce has not shown that it was prejudiced.

after the Commission reached its decision in 2015. Section 1.106(b)(2) is not satisfied where a petitioner could have presented an issue through the exercise of reasonable diligence, but failed to do so. *AT&T Corp.*, 363 F.3d at 509-10.

Royce also cites cases for the general principle that “‘justice delayed is justice denied.’” Br. 20 (citations omitted). In none of the cases, however, did a court override an agency decision based on delay complaints, as Royce asks here. On the contrary, this Court has strictly applied legal standards notwithstanding complaints of agency delay. In *Globalstar, Inc. v. FCC*, 564 F.3d 476, 484-85 (D.C. Cir. 2009), for example, the Court held that the FCC’s three-year delay in deciding a prior petition for reconsideration did not justify lifting 47 U.S.C. § 405(a)’s exhaustion requirement. Likewise, in *AT&T Corp. v. FCC*, 317 F.3d 227, 236 (D.C. Cir. 2003), the Court rejected the argument that “unreasonable delay [by the FCC] preclude[s] strict application of the exhaustion doctrine.”

III. ROYCE’S OTHER ARGUMENTS ARE NOT PROPERLY BEFORE THE COURT AND ARE MOOT

Royce argues that the staff ignored its argument based on section 1.65 of the Commission’s rules that the KUDL Application was still pending when the FCC modified the local radio ownership rule in June 2003, and improperly relied on the Third Circuit stay in not applying the modified rule. *See* Br. 6, 28-30. These two arguments challenge staff decisions that are not under review, *see Second Staff Ruling* (JA ___). Accordingly, these arguments are not properly before the Court.

“Congress did not intend that the court review a staff decision that has not been adopted by the Commission itself.” *Int’l Telecard Ass’n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999) (quoting *Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302, 1304 (D.C. Cir. 1997)). While disagreeing that the staff ignored Royce’s section 1.65 argument, the Commission fully addressed the argument. *First Order* ¶¶ 4-5 (JA ___); *see supra* § I. In addition, the Commission did not rely on the Third Circuit stay in affirming grant of the KUDL Application; it relied instead on the grandfathering decision in the 2002 Biennial Review Order. *See First Order* ¶¶ 4-5 & n.11 (JA ___). As the Commission’s orders are on review, not the complained-of staff decisions, Royce’s complaints are not properly before the Court.

In all events, the Commission cured any alleged failure by the staff to address Royce’s section 1.65 argument by fully addressing the argument itself, and did not rely on the Third Circuit stay. Because the staff decisions had no impact on the outcome of the case, Royce’s complaints about the staff decisions are moot. *See Winter Park Commc’ns v. FCC*, 873 F.2d 347, 355 n.9 (D.C. Cir. 1989) (issues raised by unsuccessful applicant for a broadcast station license were moot where the “Commission indicated . . . that neither of these issues affected the outcome of the proceeding.”); *see also Teledesic LLC v. FCC*, 275 F.3d 75, 83 (D.C. Cir. 2001) (two issues raised in petition for review from the FCC’s initial order but

fully addressed by the FCC's reconsideration order were moot and would not be addressed by the Court).

Finally, Royce states without explanation at the end of its brief that “[w]e need to wait and see . . . whether Entercom has the basic legal and character qualifications to be an FCC broadcast licensee in the Sacramento market” in light of the initiation of a proceeding to determine whether to renew Entercom’s license for a different Sacramento station, KDND(FM). Br. 30-32, citing *Entercom License, LLC*, Hearing Designation Order, FCC 16-153, 2016 WL 6393114 (rel. Oct. 27, 2016). Contrary to Royce’s suggestion, Entercom’s qualifications to be the licensee of KUDL are not at issue in the FCC proceeding, which instead concerns whether to renew the KDND license. *Id.* at ¶ 83. In all events, Entercom’s qualifications to be the KUDL licensee are not before the Court. Royce never disputed the Media Bureau’s determination – which was separate from the ruling that Entercom’s ownership of KUDL complied with the local radio ownership rule – that Entercom was qualified to hold the KUDL license in 2003. *See First Staff Ruling* ¶¶ 5-6 (JA ____). And the reasonableness of that determination is not affected by the fact that the license renewal of a different Entercom station subsequently has been called into question. *See Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1107 (D.C. Cir. 2009) (“we judge the reasonableness of an agency’s decision on the basis of the record before the agency at the time it made its decision”).

CONCLUSION

The appeal should be denied.

Respectfully submitted,

Howard J. Symons
General Counsel

David M. Gossett
Deputy General Counsel

Richard K. Welch
Deputy Associate General Counsel

/s/ William J. Scher

William J. Scher
Counsel

Federal Communications
Commission
Washington, D.C. 20554
(202) 418-1740

December 15, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD R. STOLZ II, D/B/A ROYCE
INTERNATIONAL BROADCASTING COMPANY,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

ENTERCOM COMMUNICATIONS CORP. AND

ENTERCOM LICENSE, LLC,

INTERVENORS.

No. 16-1248

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Appellee in the captioned case contains 7048 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

/s/ William J. Scher

William J. Scher

Counsel

Federal Communications Commission

Washington, D.C. 20554

(202) 418-7399 (Telephone)

Statutory Addendum

5 U.S.C. § 706.....	1
47 U.S.C. § 155(d).....	2
47 C.F.R. § 1.41	3
47 C.F.R. § 1.65(a).....	4
47 C.F.R. § 1.06(b)(2) & (p)(1)	5
47 C.F.R. § 1.115(d).....	6
47 C.F.R. § 73.3555(a) & Note 4	7

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 155(d)

§ 155. Commission

* * * * *

(d) Meetings

Meetings of the Commission shall be held at regular intervals, not less frequently than once each calendar month, at which times the functioning of the Commission and the handling of its work load shall be reviewed and such orders shall be entered and other action taken as may be necessary or appropriate to expedite the prompt and orderly conduct of the business of the Commission with the objective of rendering a final decision (1) within three months from the date of filing in all original application, renewal, and transfer cases in which it will not be necessary to hold a hearing, and (2) within six months from the final date of the hearing in all hearing cases.

47 C.F.R. § 1.41**§ 1.41 Informal requests for Commission action.**

Except where formal procedures are required under the provisions of this chapter, requests for action may be submitted informally. Requests should set forth clearly and concisely the facts relied upon, the relief sought, the statutory and/or regulatory provisions (if any) pursuant to which the request is filed and under which relief is sought, and the interest of the person submitting the request. In application and licensing matters pertaining to the Wireless Radio Services, as defined in § 1.904 of this part, such requests may also be sent electronically, via the ULS.

47 C.F.R. § 1.65(a)

§ 1.65 Substantial and significant changes in information furnished by applicants to the Commission.

(a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Except as otherwise required by rules applicable to particular types of applications, whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of the application so as to furnish such additional or corrected information as may be appropriate. Except as otherwise required by rules applicable to particular types of applications, whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

47 C.F.R. § 1.106(b)(2) & (p)(1)

§ 1.106 Petitions for reconsideration in non-rulemaking proceedings.

* * * * *

(b)(2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances are present:

- (i) The petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; or
- (ii) The petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity.

* * * * *

(p) Petitions for reconsideration of a Commission action that plainly do not warrant consideration by the Commission may be dismissed or denied by the relevant bureau(s) or office(s). Examples include, but are not limited to, petitions that:

- (1) Fail to identify any material error, omission, or reason warranting reconsideration;

47 C.F.R. § 1.115(d)

§ 1.115 Application for review of action taken pursuant to delegated authority.

(d) Except as provided in paragraph (e) of this section, the application for review and any supplemental thereto shall be filed within 30 days of public notice of such action, as that date is defined in section 1.4(b). Opposition to the application shall be filed within 15 days after the application for review is filed. Except as provided in paragraph (e)(3) of this section, replies to oppositions shall be filed within 10 days after the opposition is filed and shall be limited to matters raised in the opposition.

47 C.F.R. § 73.3555(a) & Note 4**§ 73.3555 Multiple ownership.**

(a)(1) Local radio ownership rule. A person or single entity (or entities under common control) may have a cognizable interest in licenses for AM or FM radio broadcast stations in accordance with the following limits:

(i) In a radio market with 45 or more full-power, commercial and noncommercial radio stations, not more than 8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations, not more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations, not more than 6 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM); and

(iv) In a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, not more than 5 commercial radio stations in total and not more than 3 commercial stations in the same service (AM or FM); provided, however, that no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the full-power, commercial and noncommercial radio stations in such market unless the combination of stations comprises not more than one AM and one FM station.

(2) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

* * * * *

Note 4 to § 73.3555: Paragraphs (a) through (d) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for assignment of license or transfer of control filed in accordance with § 73.3540(f) or § 73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy, or to FM or AM broadcast minor modification applications for intra-market community of license changes, if no new or increased concentration of ownership would be created

among commonly owned, operated or controlled media properties. Paragraphs (a) through (d) of this section will apply to all applications for new stations, to all other applications for assignment or transfer, to all applications for major changes to existing stations, and to all other applications for minor changes to existing stations that seek a change in an FM or AM radio station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties. Commonly owned, operated or controlled media properties that do not comply with paragraphs (a) through (d) of this section may not be assigned or transferred to a single person, group or entity, except as provided in this Note, the Report and Order in Docket No. 02–277, released July 2, 2003 (FCC 02–127), or the Second Report and Order in MB Docket No. 14–50, FCC 16–107 (released August 25, 2016).

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**Edward R. Stolz, II, d/b/a Royce International
Broadcasting Company,
Appellant**

v.

**Federal Communications Commission,
Appellee.**

CERTIFICATE OF SERVICE

I, William J. Scher, hereby certify that on December 15, 2016, I electronically filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dennis J. Kelly
LAW OFFICE OF DENNIS J. KELLY
P.O. Box 41177
Washington, DC 20018
*Counsel for: Edward R. Stolz, d/b/a
Royce International Broadcasting
Company*

Dennis Corbett
LERMAN SENTER PLLC
2001 L Street, NW
Suite 400
Washington, DC 20036
*Counsel for: Entercom Commc'ns
Corp.*

/s/ William J. Scher